05-1240-CV

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATE OF CONNECTICUT OFFICE OF PROTECTION AND ADVOCACY FOR PERSONS WITH DISABILITIES; and JAMES McGAUGHEY, EXECUTIVE DIRECTOR, STATE OF CONNECTICUT, OFFICE OF PROTECTION AND ADVOCACY FOR PERSONS WITH DISABILITIES,
Plaintiffs-Appellees,

v.

HARTFORD BOARD OF EDUCATION; HARTFORD PUBLIC SCHOOLS; and ROBERT HENRY, SUPERINTENDENT OF SCHOOLS,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR AMICI CURIAE THE DEPARTMENT OF EDUCATION AND THE DEPARTMENT OF HEALTH AND HUMAN SERVICES

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Pursuant to 28 U.S.C. § 517, Fed. R. App. P. 29(a), and this Court's March 13, 2006, invitations to the Department of Education (DOE) and the Department of Health and Human Services (HHS), we hereby submit this brief as *amici curiae*. Congress has charged HHS and DOE with administering and enforcing the federal statutes at issue in this litigation. The agencies' construction of those statutes — as set out both in implementing regulations and in this brief — is entitled to substantial deference by this Court. *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 227-228 (2001).

STATEMENT OF ISSUES ADDRESSED

1. Whether the "facilities" subject to oversight under the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. § 10801 *et seq.* (PAIMI Act), include a non-residential public school for severely emotionally disturbed children.

2. Whether an Office of Protection and Advocacy (P&A) in a participating State shall have authority under the PAIMI Act, the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15001 *et seq*. (the DD Act), or 29 U.S.C. § 794e, as implemented, to interview a minor suspected of being subject to abuse or neglect without the prior consent of a parent or guardian.

3. Whether a school for severely emotionally disturbed children must provide a P&A with the names of and contact information for parents of students

suspected of being subject to abuse or neglect, notwithstanding restrictions on the release of information from student records imposed by the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (FERPA).

BACKGROUND

A. Statutory and regulatory background.

This case involves four federal statutes: FERPA and 29 U.S.C. § 794e, enforced by DOE; and the PAIMI Act and the DD Act, enforced by HHS.

1. Family Educational Rights and Privacy Act (FERPA). FERPA denies federal funding to an educational institution with a policy or practice of releasing information from a minor student's records without a parent's or guardian's prior written consent. *See* 20 U.S.C. § 1232g. Covered records include "records, files, documents, and other materials" maintained by a school containing "information directly related to a student." *Id.* § 1232g(a)(4)(A).

FERPA contains several potentially relevant exceptions to the bar on release of information from student records. Disclosure is permitted to "authorized representatives" of "State educational authorities," as "may be necessary in connection with * * * the enforcement of the Federal legal requirements which relate to [Federally-supported education programs]." *Id.* § 1232g(b)(3).

FERPA also contains a "directory information" provision, which exempts certain information (including a student's name, address, and telephone number)

from the ban on disclosure so long as the educational institution gives prior notice of the type of information to be made public and provides a reasonable opportunity for parents to direct "that any or all of the information designated shall not be released." *Id.* § 1232g(b)(5)(A)-(B). "Directory information" is information in a student's record "that would not generally be considered harmful or an invasion of privacy if disclosed." 34 C.F.R. § 99.3.

FERPA permits the disclosure of information from student records where "furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena." 20 U.S.C. § 1232g(b)(2)(B). FERPA also permits the disclosure of information from student records "in connection with an emergency * * * if the knowledge of such information is necessary to protect the health or safety of the student or other persons." *Id.* § 1232g(b)(1)(I).

2. Protection and Advocacy for Individuals with Mental Illness Act (PAIMI Act). The PAIMI Act seeks to protect the rights of individuals with mental illness by requiring, as a condition of federal funding, that States establish protection and advocacy systems (P&As) with authority to investigate and remedy suspected abuse or neglect at facilities rendering care or treatment to the mentally ill. *See* 42 U.S.C. § 10801(b). The "facilities" covered by the PAIMI Act include, but are not limited to, nursing homes, community facilities, board and care homes, homeless shelters, and prisons. 42 U.S.C. § 10802(3). Since 2000, the individuals

with mental illness sought to be protected have included individuals who "live[] in a community setting, including their own home." *Id.* § 10802(4)(B)(ii).

The PAIMI Act provides that P&As shall have broad investigatory access to carry out their responsibility to protect individuals with mental illness and to advocate on their behalf, 42 U.S.C. § 10805(a)(1). P&As shall have a right of "access to facilities * * * providing care or treatment" to the mentally ill, 42 U.S.C. § 10805(a)(3), and also to "reasonable unaccompanied access to residents at all times necessary to conduct a full investigation" of suspected abuse or neglect. 42 C.F.R. § 51.42(b). A P&A shall also have "reasonable unaccompanied access to facilities," programs, and residents of a facility in order to monitor whether rights and safety are adequately safeguarded. *Id.*§ 51.42(c); *see also* 42 U.S.C. § 10805(a)(3). Finally, a P&A shall have authority to access "all records of individuals with mental illness" where (1) the individual's parent or guardian has consented to access; (2) the individual has no parent or guardian and the P&A has determined there is probable cause[1] to believe that the individual has been or may be subject to abuse or neglect; or (3) the P&A has probable cause to believe that an individual's health or safety is in serious and immediate jeopardy,

[1] Under both the PAIMI Act and the DD Act, "probable cause" means reasonable grounds to believe that an individual "has been, or may be at significant risk of being subject to abuse or neglect." 42 C.F.R. § 51.2; 45 C.F.R. § 1386.19.

has notified the individual's guardian or other legal representative "upon receipt of the name and address of such representative," has offered assistance to resolve the situation, and the representative has failed or refused to act. 42 U.S.C. § 10805(a)(4); *see also* 42 C.F.R. § 51.41(b)(3).[2]

If a P&A is denied access to facilities, programs, individuals, or records, it must "be provided promptly with a written statement of reasons, including, in the case of a denial for alleged lack of authorization, the name, address and telephone number of the legal guardian, conservator, or other legal representative of an individual with mental illness." 42 C.F.R. § 51.43.

3. Developmental Disabilities Assistance and Bill of Rights Act (DD Act). The DD Act directs States, as a condition of federal funding, to establish P&As "to protect the legal and human rights of individuals with developmental disabilities." *See* 42 U.S.C. § 15001(b)(1). The DD Act seeks to ensure that publicly funded programs, including educational programs serving individuals with developmental disabilities, provide care that is free of abuse or neglect. *Id.* § 15009(a)(3)(B)(i). In relevant part, the DD Act provides that P&As shall protect

[2] Under both the PAIMI Act and the DD Act, as implemented, a P&A that obtains medical records must maintain their confidentiality. *See* 42 U.S.C. § 10806(a); 45 C.F.R. § 1386.22(e)(1).

and advocate for the rights of individuals with developmental disabilities, including investigating "incidents of abuse and neglect." *Id.* § 15043(a)(2).

The DD Act's access provisions are similar to those under the PAIMI Act. P&As shall be given "access at reasonable times to any individual with a developmental disability in a location in which services, supports, and other assistance are provided." *Id.* §§ 15043(a)(2)(H), 15041; *see also* 45 C.F.R. § 1386.22(f)-(h) (P&A shall have reasonable unaccompanied access to facilities and individuals, in order to investigate suspected abuse or neglect and to monitor rights and safety). P&As also shall have access to the records of a developmentally disabled individual where (1) a parent or guardian has consented; (2) the individual has no parent or guardian and the P&A has probable cause to believe that the individual has been subject to abuse or neglect; or (3) the P&A has probable cause to believe that the individual has been subject to abuse or neglect, has notified the individual's guardian or other legal representative "upon receipt of the name and address of such representative," has offered assistance to resolve the situation, and the representative has failed or refused to act. 42 U.S.C. § 15043(a)(2)(I). If the P&A has probable cause "to believe that the health or safety of the individual is in serious and immediate jeopardy," it shall have access to records immediately without notice to or consent from a parent or guardian. *Id.* § 15043(a)(2)(J)(ii).

If a P&A is denied access, it must be given a written explanation, including the name of and contact information for a parent or guardian in cases of alleged lack of authorization. 45 C.F.R. § 1386.22(i).

4. 29 U.S.C. § 794e.

In 29 U.S.C. § 794e, Congress provides funding to States to establish P&As to protect the legal and human rights of disabled individuals not covered by the PAIMI Act or the DD Act. Section 794e provides that P&As shall pursue legal, administrative, and other remedies to protect the rights of disabled individuals, and shall have the same "general authorities, including access to records," as under the DD Act. *Id.* § 794e(f)(2); *see also* 34 C.F.R. § 381.10(a)(2).

B. Factual and Procedural Background.

This case arises out of the Connecticut P&A's investigation of suspected abuse or neglect at the Hartford Transitional Learning Academy (Academy), a non-residential public school in Connecticut that serves seriously emotionally disturbed children. *See* J.A. 10, 64. After the Academy denied the P&A access to students and refused to provide the names of and contact information for students' parents or guardians, the P&A brought this action in district court, which ordered the Hartford Board of Education to provide the access and information sought. 355 F. Supp. 2d 649 (D. Conn. 2005).

ARGUMENT

I. UNDER THE PAIMI ACT, A P&A SHALL HAVE AUTHORITY TO INVESTIGATE ABUSE OR NEGLECT AT A NON-RESIDENTIAL FACILITY PROVIDING CARE OR TREATMENT TO THE MENTALLY ILL.

The PAIMI Act provides that P&As shall have authority to "investigate incidents of abuse and neglect of individuals with mental illness" committed by employees or staff of "facilities" rendering care or treatment. 42 U.S.C. §§ 10805(a)(1)(A), (3), 10802(1), (5). HHS reasonably interprets the statute to apply to a broad range of facilities, including non-residential facilities, that render care or treatment to mentally ill individuals. A non-residential school for severely emotionally disturbed children is thus within the scope of the PAIMI Act.[3]

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[3] We note, however, that the Court need not decide this question because, as the district court correctly held, the Connecticut P&A was authorized pursuant to the DD Act and 29 U.S.C. § 794e to investigate abuse or neglect at the Academy, which serves numerous children with developmental and other disabilities. 355 F. Supp. 2d at 654, 656-657. The DD Act recognizes that public funds should support only "community programs, including educational programs in which individuals with developmental disabilities participate," providing care that is free from abuse or neglect, and also that non-residential programs should provide appropriate care to the individuals they serve. 42 U.S.C. § 15009(a)(3)(B)(i), (a)(4)(B)(iii). In order to protect these "legal and human rights of individuals with developmental disabilities," the DD Act requires that P&As be authorized to have "access at reasonable times to any individual with a developmental disability in a location in which services, supports, and other assistance are provided to such an individual." *Id.* § 15043(a)(2)(H), 15001(b)(2); *see also* 29 U.S.C. § 794e(f)(2) (incorporating same access rights).

As originally enacted in 1986, the PAIMI Act applied only to mentally ill individuals who were inpatients or residents of facilities rendering care or treatment. *See* Pub. L. No. 99-319, Title I, § 102, 100 Stat. 478, 479. In 1991, Congress amended the statute to define explicitly the "facilities" covered by the statute, which "may include, but need not be limited to, hospitals, nursing homes, community facilities for individuals with mental illness, board and care homes, homeless shelters, and jails and prisons." Pub. L. No. 102-173, § 4, 105 Stat. 1217; *see also* S. Rep. No. 114, 102d Cong., 1st Sess., 2-3, 4 (1991).

In 2000, Congress again broadened the reach of the Act to include within its scope mentally ill individuals who "live[] in a community setting, including their own home." Pub. L. No. 106-310, Div. B, Title XXXII, § 3206(b)(1)(B), 114 Stat. 1194. The statutory change was part of a set of amendments to strengthen community-based mental health services and enable children with severe emotional disturbances to "remain in local communities rather than being sent to residential facilities." S. Rep. No. 196, 106th Cong., 1st Sess. 1, 6 (1999). The specific change to the PAIMI Act was intended to ensure that P&As could "work on behalf of [mentally ill] persons living at home," who might "be subject to abuse or neglect or discrimination in housing, health care, employment or benefits." *Id.* at 25-26. It was also intended to ensure that P&As would have the same authority as provided pursuant to the DD Act, *see id.* at 26 — which, as we have explained

(at n. 3, *supra*), directs that a P&A shall be authorized to investigate suspected abuse or neglect at *any* location providing services or support. *See* 42 U.S.C. § 15043(a)(2)(H).

In light of this statutory text and history, HHS reasonably interprets the investigatory authority of a P&A pursuant to the PAIMI Act as extending to any facility providing care and treatment to the mentally ill, regardless of whether the facility is residential.[4] The agency's interpretation is fully consistent with the statutory definition of "facilities," both because the definition's list of the types of facilities covered by the statute is non-exhaustive, and because, in any event, the definition includes "community facilities for individuals with mental illness." *Id.* § 10802(3). Construing the PAIMI Act to apply to non-residential facilities also effectuates Congress' intent that protection and advocacy services be provided to *all* individuals with mental illness, including those living at home. The defendants' narrower construction of the PAIMI Act is inconsistent with its text, history, and purpose.

[4] As the district court correctly recognized, to the extent that HHS's 1997 regulations are inconsistent with the agency's current construction of the PAIMI Act, the regulations have been legislatively superseded. 355 F. Supp. 2d at 659.

II. A P&A MAY INTERVIEW A MINOR STUDENT SUSPECTED OF BEING SUBJECT TO ABUSE OR NEGLECT WITHOUT PRIOR CONSENT FROM A PARENT OR GUARDIAN.

Under the PAIMI Act, the DD Act, and 29 U.S.C. § 794e, a P&A shall be authorized to interview a minor student at a school for severely emotionally disturbed children, if the P&A determines that the student is subject to abuse or neglect. In exercising its authority, the P&A is not required to provide advance notice to a parent or guardian, or to obtain prior consent.

The DD Act provides that a P&A "shall * * * have the authority to have access at reasonable times to any individual with a developmental disability in a location in which services, supports, and other assistance are provided to such individual," in order to protect the individual's legal and human rights. 42 U.S.C. §§ 15043(a)(2)(H), 15041. The DD Act also provides that a P&A shall "have the authority to investigate incidents of abuse and neglect." *Id.*§ 15043(a)(2)(B). The DD Act does not condition these rights of access to individuals — which are also incorporated by reference in 29 U.S.C. § 794e(f)(2), with regard to other disabled individuals — on notice to and consent from an individual's parent or guardian. In contrast, where a P&A seeks records, the DD Act requires parental notification and, in some circumstances, an attempt to obtain parental consent, as a condition of access. *Id.* § 15043(a)(2)(I)(iii), (J). The clear import is that Congress intended for P&As to have authority to interview disabled individuals suspected of being

subject to abuse or neglect, with no requirement of prior parental notification or consent.

Similarly, the PAIMI Act provides that a P&A shall have authority to "have access to facilities * * * providing care or treatment" to individuals with mental illness, and also shall have authority to "investigate incidents of abuse and neglect." 42 U.S.C. §§ 10805(a)(3), (a)(1)(A). As implemented by HHS, the statutes require that a P&A have a right of reasonable unaccompanied access to an individual served by a covered program "at all times necessary to conduct a full investigation of an incident of abuse or neglect." 42 C.F.R. § 51.42(b)-(c). Under the statute and implementing regulations, a P&A's authority to access individuals or facilities is not conditioned on parental notification or consent — unlike access to records, where notice and consent are usually required. *See* 42 U.S.C. § 10805(a)(1)(A), (a)(3); 42 C.F.R. § 51.42(d)-(e).

Finally, the defendants are incorrect to assert (at Def. Br. 9-10) that P&A interviews of minor students implicate FERPA's restrictions on the release of information from education records. FERPA applies only to the disclosure of tangible records and of information derived from tangible records. It does not

apply to a P&A's discovery of information about a student as a result of physical access to that student or the student's school.[5]

III. A SCHOOL MUST PROVIDE A P&A WITH THE NAME OF AND CONTACT INFORMATION FOR THE PARENT OR GUARDIAN OF A STUDENT FOR WHOM THE P&A HAS THE REQUISITE DEGREE OF PROBABLE CAUSE TO OBTAIN RECORDS UNDER THE DD ACT OR THE PAIMI ACT.

A. The DD Act — and, by incorporation, 29 U.S.C. § 794e — require that a P&A be authorized to obtain names and contact information for the parent or guardian of a disabled student reasonably believed by the P&A to be subject to abuse or neglect. The PAIMI Act requires that a P&A have authority to obtain that information for a mentally ill student whose health or safety the P&A believes to be in serious and immediate jeopardy.

In relevant part, the PAIMI Act requires a P&A to have authority to access records of an individual with a mental illness where the P&A has probable cause to believe that the individual's health or safety is in serious and immediate jeopardy, and the individual's parent, guardian, or other legal representative has

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[5] *See* Dep't of Educ., Dec. 8, 2003, Letter to S. Mamas (explaining that FERPA does not prohibit a parent or professional from observing a child in a classroom, because FERPA "does not protect the confidentiality of information in general," but only "tangible records" and information derived from them); Dep't of Educ., Recent Amendments to Family Educational Rights and Privacy Act Relating to Anti-Terrorism Activities, at 4 (Apr. 12, 2002) ("Nothing in FERPA prohibits a school official from disclosing * * * information that is based on that official's personal knowledge or observation * * *.").

failed to act after being contacted by the P&A "upon receipt of the name and address of such representative." 42 U.S.C. § 10805(a)(4)(C). The DD Act requires that a P&A have authority to access records in similar circumstances, following "receipt of the name and address" of the individual's representative. *Id.* § 15043(a)(2)(I)(iii). These provisions thus expressly contemplate that a school or other facility will provide contact information to a P&A in order to allow the P&A to carry out its responsibility to investigate abuse or neglect. Regulations promulgated under the statutes accordingly require that, where a facility or location denies a P&A access to records, it must provide "a written statement of reasons, including, in the case of a denial for alleged lack of authorization, the name, address and telephone number" of the individual's guardian or other representative. *See* 42 C.F.R. § 51.43; 45 C.F.R. § 1386.22(i).[6]

Thus, to the extent that the Connecticut P&A had probable cause to believe that the health or safety of mentally ill students at the Academy was in serious or

[6] As a practical matter, a P&A might be unaware, when it requests access to records, whether the affected individual has a parent, guardian, or other legal representative. If not, or if the individual's legal representative is the State, the P&A is entitled to access based on its probable cause determination. *See* 42 U.S.C. §§ 10805(a)(4)(B), 15043(a)(2)(I)(ii). The P&A would only learn of the legal representative's existence — and his or her name and contact information — when the facility or location resists access on the ground of lack of authorization.

immediate jeopardy, or that disabled students were subject to abuse or neglect,[7] the P&A had a clear right to the name and contact information of those children's parents, guardians, or other legal representatives.

B. FERPA does not bar a P&A from obtaining access to the name of and contact information for a parent, guardian, or other legal representative of a minor student with a disability or mental illness, where the P&A's probable cause determination satisfies the requirements for access to records under the PAIMI Act and the DD Act. To the extent that the statutes are in conflict, the specific access provisions of the PAIMI Act and the DD Act (and 29 U.S.C. § 794e, by incorporation) are properly understood as a limited override of FERPA's generally applicable non-disclosure requirements.

In some circumstances, disclosures from student records to a P&A might fall under FERPA's health and safety exception. The facts supporting a P&A's determination that a mentally ill student's health or safety is in serious and immediate jeopardy, *see* 42 U.S.C. § 10805(a)(4)(C), for example, might also support a school's determination that an "emergency" existed in which disclosure

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[7] HHS and DOE take no position on the issue whether the Connecticut P&A's probable cause determination extends to all students at the Academy. As HHS has previously noted, however, "neither the Act nor case law imposes an individual-specific probable cause requirement," and probable cause may appropriately be based on "general conditions or problems that affect many or all individuals in a facility." 62 Fed. Reg. 53,548, 53,559 (Oct. 15, 1997).

of information was "necessary to protect the health or safety of the student or other persons." 20 U.S.C. § 1232g(b)(1)(I).

As a categorical matter, however, a P&A's request for name and contact information under the PAIMI Act and the DD Act would not always satisfy a FERPA exception to non-disclosure. If a P&A seeks to investigate past abuse or neglect, or abuse or neglect that does not place students' health or safety in serious and immediate jeopardy, there might be no "emergency" necessitating disclosure under FERPA. *See* 34 C.F.R. § 99.36(c) (exception to be strictly construed).

Nor would the FERPA provision permitting disclosure of information to "State educational authorities" apply. A state educational authority is an agency or other entity with educational expertise and experience, charged with regulating, planning, or supervising state educational programs and services. *See* Dep't of Educ., Jul. 11, 2005, Letter to D. Wilkins. In contrast, P&As — which might be private organizations rather than state authorities — need not be educational experts and are not charged with planning or regulating educational programs *per se*.

Release of record information to a P&A under FERPA's directory information exception would not be proper, because that exception contemplates that parents can opt out of disclosure. *See* 20 U.S.C. § 1232g(a)(5)(B). Furthermore, the exception would not permit a P&A to seek information regarding

students identified by their disability status or receipt of a particular treatment, because it does not permit the disclosure of directory information which would also disclose non-directory information, such as a student's assignment to a class for developmentally disabled students or receipt of a particular form of therapy. *See* 65 Fed. Reg. 41,852, 41,855 (July 6, 2000).

Finally, it would be inappropriate to require a P&A to obtain parental consent or a court order as a necessary condition to seeking access to student records pursuant to the PAIMI Act or the DD Act. Those statutes require a P&A to contact an individual's parent or guardian as a condition of access to records. If a school or other facility could refuse to provide name and contact information, it could interfere substantially with a P&A's investigation of abuse or neglect, thereby thwarting Congress' intent that P&As act to protect vulnerable populations from abuse or neglect. And requiring a P&A to seek a court order as a condition of access would be inconsistent with a statutory scheme providing for speedy access to records, *see* 42 U.S.C. § 15043(a)(2)(J), based on a determination of possible abuse or neglect made by a P&A rather than a judicial officer,[8] and

[8] Although HHS and DOE agree that a P&A is not required as a condition of access to obtain a judicial determination of probable cause, we disagree with the suggestion that a P&A's probable cause determination is immune from judicial review. *See* 62 Fed. Reg. at 53,552; 61 Fed. Reg. 51,142, 51,145 (Sept. 30, 1996).

under a substantive standard different from Fourth Amendment requirements for a judicial warrant. *See* 42 C.F.R. § 51.2; 45 C.F.R. § 1386.19.

Given the conflict between the access rights afforded to a P&A pursuant to the PAIMI Act and the DD Act, and the non-disclosure requirements imposed by FERPA, this Court should reject the defendants' invitation to constrain the P&A's broad investigatory authority to those limited circumstances set forth in FERPA's exceptions. Instead, the Court should construe the PAIMI Act and the DD Act as a limited override of FERPA's non-disclosure requirements, in the narrow context where those statutes require that a P&A have authority to obtain student records held by an institution servicing disabled and/or mentally ill students.

When Congress enacted the relevant access provisions of the PAIMI Act in 1991 and the DD Act in 2000, it did so against an existing background of student record privacy pursuant to FERPA, enacted in 1974. There is no indication that Congress believed that the carefully tailored access rights required under those later-enacted statutes would be subordinate to the general privacy requirements of FERPA. *Cf. United States v. Estate of Romani*, 523 U.S. 517, 532 (1998) (treating "later" and "more specific statute" as governing); *Radzanower v. Touche Ross Co.*, 426 U.S. 148, 153 (1976) (statute dealing with "narrow, precise, and specific subject" should be given effect in preference to "statute covering a more generalized spectrum"); *see also* Dep't of Educ., Nov. 29, 2004, letter to M. Baise,

University of New Mexico (federal statute conditioning funding on States' adoption of mandatory reporting requirements for child abuse and neglect superseded inconsistent provisions of FERPA); Dep't of Educ., Nov. 25, 1997, letter to J. Talisman, Department of the Treasury (concluding that federal law requiring educational institutions to report certain tuition payment information to IRS was inconsistent with FERPA but, "as the later enacted and more specific statute," reflected Congress' intent to supersede applicable FERPA provisions).

Furthermore, the construction of the statutes that gives greatest effect to their provisions is to read the record access provisions of the PAIMI Act and the DD Act as a limited override of FERPA. Congress' intent that P&As have broad investigatory authority would be thwarted if the P&A's right of access to parental contact information or other information from student records were limited to circumstances that satisfy a FERPA exception to non-disclosure. On the other hand, permitting access as provided for under the PAIMI Act and the DD Act is generally consistent with Congress' intent relating to student privacy. FERPA permits disclosure of information to state and federal officials in certain circumstances where disclosure is necessary for enforcement of federal legal requirements. *See* 20 U.S.C. § 1232g(b)(3). FERPA also permits disclosure of parents' names and contact information, indicating Congress' view that such information is less sensitive than other information contained in student records.

And FERPA permits disclosure of information to protect students' health and safety in emergency situations. Although none of these precise exceptions applies here, taken together they suggests that disclosure of contact information to a P&A — which, significantly, functions as an advocate for a student rather than as a disinterested outsider — would be generally consistent with FERPA's requirements. Furthermore, because a P&A is required to maintain the confidentiality of any student records it receives, *see* 42 U.S.C. § 10806(a); 45 C.F.R. § 1386.22(e), there is little risk of the public disclosure of information that FERPA is intended to prevent. In those circumstances, the proper construction of the statutes is that the PAIMI Act and the DD Act provide for a limited override of FERPA to permit a P&A to access names and contact information for the parents or guardians of disabled or mentally ill students, where the P&A's determination of probable cause satisfies the substantive standards for record access.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

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JUNE 2006

CERTIFICATE OF SERVICE

I certify that on June 2, 2006, I filed the foregoing Brief for Amici Curiae the Department of Education and the Department of Health and Human Services by causing it to be sent to the Court and the following counsel by overnight delivery:

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ADDENDUM

For the Court's convenience, we have attached the following administrative materials cited in the brief:

Dep't of Educ., Dec. 8, 2003, Letter to S. Mamas

Dep't of Educ., Recent Amendments to Family Educational Rights and Privacy Act Relating to Anti-Terrorism Activities (Apr. 12, 2002)

Dep't of Educ., Jul. 11, 2005, Letter to D. Wilkins

Dep't of Educ., Nov. 29, 2004, letter to M. Baise, University of New Mexico

Dep't of Educ., Nov. 25, 1997, letter to J. Talisman, Department of the Treasury